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THE CLIMATE REPORT

DEPARTMENTS

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CLIMATE CHANGE ACKNOWLEDGEMENTS OF KEY TRUMP NOMINEES LEAVE ADMINISTRATION'S POLICY UNCERTAIN

Aside from the near certainty that the Obama Administration's signature Clean Power Plan will never be implemented, the best advice regarding the Trump Administration's expected policy on climate change is to "wait and see." After campaign statements that seemed unequivocally dismissive of government action to address climate change, recent statements by those members of the new Cabinet whose job descriptions most directly touch the issue, and by President Trump himself, suggest the new Administration's policies may be informed more by aversion to the perceived economic burdens of climate change regulation than by philosophical hostility to the underlying goals of such regulation.

In their Senate confirmation hearings, President Trump's nominees to head the Environmental Protection Agency, the Department of Energy, the Department of the Interior, and the State Department all acknowledged the existence of climate change and some degree of human contribution to the phenomenon. Incoming EPA Administrator Scott Pruitt testified, "Let me say to you science tells us that the climate is changing, and that human activity in some manner impacts that change." Incoming Energy Secretary Rick Perry stated, "I believe the climate is changing. I believe some of it is naturally occurring, but some of it is also caused by man-made activity." Incoming Interior Secretary Ryan Zinke testified that it is "indisputable" that climate change is occurring and that human activity has an influence. Finally, echoing comments that he made as CEO of Exxon Mobil, incoming Secretary of State Rex Tillerson testified that "the risk of climate change does exist, and the consequences could be serious enough that action should be taken." Indeed, *after* the election, President Trump himself told *The New York Times* that he would "keep an open mind" on the subject.

Only time will tell whether such statements were primarily offered to facilitate Senate confirmation. Moreover, each cabinet nominee qualified his general acknowledgements with varying degrees of skepticism regarding the relative degree of human responsibility, the reliability of predictive climate models, and/or the appropriateness of current climate change strategies. And all expressed a general view that climate change does not warrant the level of importance ascribed to it by the Obama Administration in comparison to other public priorities, such as energy independence, foreign competitiveness, and overall economic growth. Finally, and perhaps most significantly, it remains to be seen how much influence anyone working outside the White House—including Cabinet secretaries—will have on policy formulation in the Trump Administration.

The new Administration seems certain, at a minimum, to be less aggressive in seeking to reduce the role that fossil fuels play in the U.S. economy. However, given the domestic and international backlash, along with the legal hurdles, that an open philosophical rejection of the need for climate change regulation would trigger, the new Administration might adopt an official position generally consistent with the statements of its cabinet nominees while reorienting its regulatory approach to place far greater emphasis on minimizing the economic impacts of climate-based regulation on U.S. businesses and consumers.

One test of this hypothesis will be the new Administration's approach to the Paris Agreement on climate change, which took effect in the fall of 2016. Secretary Tillerson has expressed his belief, publicly and in discussions with President Trump, that the President should reconsider his campaign pledge to withdraw entirely from the agreement because, in Tillerson's view, it is important for the United States to have "a seat at the table" in international climate change policy discussions.

Since there are no mechanisms for enforcement of the national emission reduction pledges in the Paris Agreement and no explicit penalties for falling short, the United States has very little to lose by remaining in the agreement, even if accompanied by a less aggressive U.S. policy that will produce smaller emission reductions. One campaign promise that is likely to be kept, however, is President Trump's pledge to cease contributions to the United Nations' Green Climate Fund, to which the Obama Administration had paid $1.5 billion of its $4 billion pledge.

No comparable survival pathway exists for the Clean Power Plan, which sought to dramatically reduce carbon dioxide emissions from the U.S. power industry. Implementation of the plan is stayed by order of the U.S. Supreme Court. Having participated as Oklahoma attorney general in the lawsuit that produced that stay, EPA Administrator Pruitt is not expected to abandon his belief that the scope of the plan exceeded U.S. EPA's legal authority.

While there are multiple procedural pathways through which the Clean Power Plan might ultimately cease to exist, the larger question is whether Administrator Pruitt will propose an alternative approach and, if so, how that replacement will seek to reduce emissions while minimizing adverse economic effects. It is noteworthy that Mr. Pruitt testified in his confirmation hearing that "EPA has a very important role at regulating the emissions of CO_2."

In any event, the new Administration will necessarily have to resolve tensions between competing campaign promises with climate change implications. For example, to the extent that the President's policies shift federal support from renewable energy sources, such as wind and solar, to traditional fossil fuel sources, such as coal and natural gas, there would presumably be job losses in the renewable energy industry, and it cannot be assumed that such losses would be offset by gains in the fossil fuel industry. Thus, job creation and preservation, a central theme of the Trump campaign, could influence the new Administration's appetite for programs that support the development of low-carbon energy technologies.

Similarly, Trump pledged his support for increases in both natural gas and coal production, despite the natural economic competition between those two industries and the likelihood that increased activity in one sector could come at the expense of the other. Further, the President has already signed an Executive Order signaling his support for the Keystone XL pipeline, which would facilitate the importation of Canadian crude oil. Natural gas, which generally emits less carbon dioxide than other fossil fuels to produce a given amount of energy, may continue to supplant the use of higher-emitting fossil fuels based simply on price, rather than regulatory preference.

In the end, it remains to be seen whether and how the climate change statements of President Trump's cabinet nominees will influence Administration policy. It also remains to be seen how the resolution of competing campaign pledges to various constituencies will impact the economics of the multifaceted U.S. power industry, which will necessarily affect overall greenhouse gas emissions. As with a host of other policies yet to be defined by the new Administration, we will simply have to wait and see.

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U.S. REGULATORY DEVELOPMENTS

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PRESIDENT TRUMP'S CHOICE TO HEAD U.S. EPA JOINED LEGAL CHALLENGE TO CLEAN POWER PLAN

On February 2, 2017, the U.S. Senate Committee on Environment & Public Works voted to report to the full Senate the nomination of Attorney General E. Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency ("EPA"). Mr. Pruitt's confirmation by the full Senate is expected this week.

Mr. Pruitt has been the attorney general of Oklahoma since 2011, and he previously served eight years in the Oklahoma State Senate. Mr. Pruitt's background also includes several years in private law practice, where he specialized in constitutional and employment issues. Unlike the prior EPA Administrator, Mr. Pruitt does not have an environmental science background.

During his time as attorney general, however, Mr. Pruitt has focused on environmental matters. For example, his personal website states that he "has led Oklahoma's legal challenges to . . . the EPA's intrusion into property rights." Similarly, Oklahoma's official website refers to Mr. Pruitt as a "leading advocate against the EPA's activist agenda." Under Mr. Pruitt's leadership, the Oklahoma Attorney General's Office has participated in several lawsuits against the EPA, including a challenge to the Clean Power Plan, a regulation concerning greenhouse gas emissions from existing power plants. Oklahoma joined several state and industry petitioners in arguing that the Clean Power Plan is not authorized by the Clean Air Act and unconstitutionally commandeers and coerces states.

In his confirmation hearing, Mr. Pruitt similarly asserted that the EPA has exceeded its authority in the past: "I saw examples where the Agency became dissatisfied with the tools Congress has given it to address certain issues, and bootstrapped its own powers and tools through rulemaking. This, unfortunately, has resulted only in protracted litigation, where the courts suspended most of these rules after years of delay." Mr. Pruitt's opening statement also emphasized that the EPA should aim to be more cooperative with Congress and the states.

If Mr. Pruitt is confirmed as the new EPA Administrator, he may consider revising or rescinding the Clean Power Plan and other Obama-era environmental regulations, and could potentially have several means of doing so. The November 2016 publication, *Energy and Environmental Ramifications of the Trump Election*, provides additional information about the potential impact of the new Administration.

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CALIFORNIA AIR RESOURCES BOARD UPDATES PLAN TO ACHIEVE FURTHER REDUCTIONS IN GREENHOUSE GAS EMISSIONS

On January 20, 2017, the California Air Resources Board ("CARB") published the 2017 Climate Change Scoping Plan Update. The updated plan outlines proposed strategies for reducing statewide greenhouse gas ("GHG") emissions to 40 percent below 1990 levels by 2030, as required by the California legislature in last year's Senate Bill 32 ("SB 32"). As required by Assembly Bill 197 ("AB 197"), the companion to SB 32, the Scoping Plan also seeks to prioritize direct emission reductions at large stationary sources and to consider "social costs" such as health impacts of GHG emissions. CARB's proposals—many building on programs already in place—have the potential to affect every sector of California's economy. In this article, we summarize a few of these notable proposals.

Significant Changes to Cap and Trade Program. Under cap and trade, operators of large stationary sources (those that emit more than 25,000 metric tons of carbon dioxide equivalent ("CO2e") per year) must surrender GHG emission allowances or offset credits for each metric ton of CO2e emissions. Allowances may be purchased and also are allocated for free by CARB to participants in certain industries deemed to have the greatest risk of relocating their operations outside California. Offset credits may be purchased from operators of qualifying projects, such as forest management and forest conservation projects, which have beneficial effects on atmospheric GHG levels.

CARB is developing new regulations to extend cap and trade to 2030, 10 years beyond its current expiration date of 2020. In addition to lowering the statewide emission limits as required by SB 32, CARB is considering reducing the free allocations of allowances and reducing the extent to which offset credits may be used to achieve compliance. CARB is evaluating these measures in order to prioritize direct emission reductions at stationary sources, as required by AB 197. CARB also proposes to reduce free allocations of allowances to sources that emit criteria or toxic pollutants above a baseline level.

The potential effects of these proposals—including increased burden on regulated entities, risks of industry flight, and reduced incentive for offset projects—will depend upon the yet-to-be-developed program details. But in any case, a reduction in the amount of available emission allowances and credits will increase compliance costs.

New Efficiency Standards for Refineries. The Scoping Plan Update singles out the refinery sector for new direct regulation. CARB proposes to implement regulations requiring a 20 percent reduction in GHG emissions from California's refineries by 2030. The regulation would use an efficiency benchmark of GHG emissions per unit of product and require each facility to achieve that benchmark. CARB acknowledges that different facilities will have different efficiency starting points, and that different "regulatory paths" likely will be necessary.

Transportation Programs. CARB proposes to reduce emissions associated with transportation fuels, while dramatically expanding the use of zero-emission vehicles ("ZEV") and low-emission vehicles in California. The Low-Carbon Fuel Standard requires manufacturers and importers of transportation fuel to surrender credits based on the carbon intensity of their fuels. CARB proposes to reduce the total carbon intensity of California's transportation fuels by 18 percent by 2030, replacing the current goal of 10 percent by 2020.

The Scoping Plan Update proposes to achieve 100 percent ZEV sales in the light-duty vehicle category by 2030. CARB will develop policies, such as rebates and other incentives, to make ZEVs "clear market winners." CARB also seeks to increase the use of ZEV or low-emission vehicles in the freight and delivery industries and in urban bus fleets, among other programs.

CARB has published a Draft Environmental Assessment evaluating the environmental impacts of the Scoping Plan Update. CARB is accepting public comments on the Scoping Plan Update and the Draft Environmental Assessment. The deadline for submitting comments on either document is March 6, 2017.

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CLIMATE CHANGE ISSUES FOR MANAGEMENT

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G20 TASK FORCE RELEASES RECOMMENDED GUIDELINES FOR CLIMATE RISK DISCLOSURES

In 2015, amid growing concerns over climate-related financial risks, the G20 Finance Ministers and Central Bank Governors asked the Financial Stability Board, an international body that monitors and makes recommendations about the global financial system, to review how the financial sector can account for climate-related risk. On December 4, 2015, the Financial Stability Board established the industry-led Task Force on Climate-Related Financial Disclosures ("Task Force"). The 32-member Task Force is chaired by Michael Bloomberg and includes members from global banks, insurance companies, asset managers, pension funds, accounting and consulting firms, credit rating agencies, and other nonfinancial companies.

The Task Force was asked to develop "voluntary, consistent climate-related financial disclosures that would be useful to investors, lenders, and insurance underwriters in understanding material risks." On December 14, 2016, the Task Force published its recommendations on climate-related financial disclosures. In developing the recommendations, the Task Force stated that it "drew on member expertise, stakeholder engagement, and existing climate-related disclosure regimes to develop a singular, accessible framework for climate-related financial disclosure."

The Task Force's report includes four major recommendations applicable to all sectors, which are outline below. Within the four major recommendations are a total of 11 specific recommendations.

Governance. The Task Force recommends disclosing the organization's general governance concerning climate-related risks and opportunities. Specific recommendations include describing the board's oversight of these risks and opportunities, as well as management's role in assessing and managing these risks and opportunities.

Strategy. The Task Force recommends disclosing the actual and potential impacts of climate-related risks and opportunities on the organization's business, strategy, and financial planning. Specifically, organizations are encouraged to: (i) describe the climate-related risks and opportunities the organization has identified; (ii) describe the impact of these risks and opportunities on the organization's business, strategy, and financial planning; and (iii) describe the potential impact of different climate change scenarios on the organization's business, strategy, and financial planning.

Risk Management. The Task Force recommends disclosing how the organization identifies, assesses, and manages climate-related risks, including the processes for identifying and managing these risks and how these processes are integrated into the organization's overall risk management.

Metrics and Targets. The Task Force recommends disclosing the metrics and targets used to assess and manage climate-related risks and opportunities, including greenhouse gas emissions and related risks, as well as performance against targets.

The report also includes guidance for organizations in developing climate-related financial disclosures consistent with the Task Force's recommendations. The guidance provides additional context, suggestions, and examples to assist organizations with implementing the recommendations.

The investor group Ceres immediately praised the Task Force's recommendations, stating that they "will help standardize how climate risks and opportunities are analyzed by companies, and generate critical information for investors to help them make better decisions." Ceres also noted that the recommendations were the result of corporate and G20 involvement that had not been seen before in the context of climate-related risk disclosure. Indeed, as has been reported extensively in *The Climate Report*, there has been much confusion and contention over climate risk disclosure.

The effect of the Task Force's recommendations remains to be seen. The recommendations are voluntary; however, given the level of corporate involvement in developing the recommendations, they could prove to be a valuable starting point for companies amid growing pressure to disclose climate-related risk. Further, Ceres advocates for the recommendations to serve as the foundation for future mandatory disclosures, stating that "mandatory disclosure is the only way to ensure that reporting is truly comparable and consistent."

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LARGE COMPANIES SET—AND MEET—RENEWABLE ENERGY GOALS

Amid talk of environmental deregulation in Washington, the world's largest companies are not backing down from ambitious renewable energy initiatives. Eighty-four companies have joined RE100, which launched at Climate Week NYC 2014 and describes itself as "a collaborative, global initiative of influential businesses committed to 100 percent renewable electricity, working to massively increase demand for—and delivery of—renewable energy." By signing on, these companies have stated a goal to be 100 percent powered by renewable energy in the future.

Large tech firms have made an especially strong showing on the list. Microsoft has been 100 percent powered by renewable energy—through a mix of power purchase agreements and purchases of renewable energy certificates ("RECs")—since 2014. The company is now working to increase its direct power purchase agreements by "support[ing] the construction of new renewable electricity projects near [its] data centers and facilities," which would decrease its reliance on RECs to meet the 100 percent renewable target.

Google joined RE100 in December 2015, pledging to "triple its purchase of renewable energy by 2025," with a "long term goal to power all of its operations with renewables." The company has moved much faster than expected, however, and announced in a December 2016 white paper that it is on track to reach its 100 percent renewable target—through a "combination of direct purchases from renewable developers and through partnerships with utilities providers"—in 2017. In addition to environmental concerns, Google has stated that for them, the decision is a smart business move, given the falling price of renewable energy and the protection renewable energy offers from fuel-price volatility.

Renewable energy initiatives are not limited to the tech sector. Companies from such diverse sectors as retail, banking, and pharmaceuticals have signed on to RE100. Last September, Wells Fargo stated a goal to achieve 100 percent renewable power by 2017. Wells Fargo sees the financial sector, in particular, as having an important role to play in the development of renewable energy: "As an example of the role financial institutions can play, since 2012, Wells Fargo has invested in and financed more than $52 billion in renewable energy, clean technology, 'greener' buildings, sustainable agriculture and other businesses that seek to mitigate the impacts of climate change. And in 2015, projects owned in whole or in part by Wells Fargo generated 10 percent of wind and solar photovoltaic energy produced in the U.S."

Other companies have thrown their support behind global environmental policy initiatives. In November 2016, Johnson & Johnson joined hundreds of companies in signing an open letter "to elected US Leaders to strongly support: 1. Continuation of low-carbon policies to allow the US to meet or exceed our promised national commitment and to increase our nation's future ambition; 2. Investment in the low carbon economy at home and abroad in order to give financial decision-makers clarity and boost the confidence of investors worldwide; and 3. Continued US participation in the Paris agreement, in order to provide the long-term direction needed to keep global temperature rise below 2°C."

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RENEWABLE ENERGY AND CARBON MARKETS

Gerald P. Farano, Editor

PRESIDENT TRUMP MAKES KEY ENERGY REGULATORY APPOINTMENTS

President Donald J. Trump has named several individuals to play key roles in advancing the President's "America First" energy plan: (i) former Texas Governor James Richard "Rick" Perry as Secretary of Energy; (ii) FERC Commissioner Cheryl LaFleur as Acting Chairman of the Federal Energy Regulatory Commission ("FERC" or "Commission"); and (iii) Nuclear Regulatory Commission ("NRC") Commissioner Kristine Svinicki as Chairman of the NRC. President Trump's energy plan is focused on reducing U.S. dependence on foreign oil; reducing or eliminating a number of policies and regulations in the energy industry, such as the Climate Action Plan and the Waters of the U.S. rule; maximizing domestic production of shale gas; and "reviving" the U.S. coal industry.

Secretary of Energy. On December 14, 2016, President Trump announced his intention to appoint Perry to head the Department of Energy. Perry—the 47th Governor of Texas and a two-time Presidential candidate—was widely seen as an unusual pick, given his 2012 campaign promise to abolish the agency he has now been selected to lead, a position he has since renounced. Nonetheless, Perry is familiar with energy issues, having led a state that produces significant amounts of the nation's crude oil and natural gas supply and has a robust wind industry.

At his confirmation hearing on January 19, 2017, Perry outlined his vision for the role of the Department of Energy, which includes continuing efforts to protect and modernize the country's nuclear stockpile, ensuring reliability of the electric power grid against cybersecurity attacks, improving the country's emergency response efforts, and overseeing and developing energy policies that will stimulate economic growth and produce jobs. Perry indicated that he will take an "all of the above" approach to the use of energy resources, ensuring that all resources are used to maximize domestic energy production. Additionally, Perry expressed a commitment to fostering scientific and climate research and protecting the environment. On January 31, 2017, the Senate Energy and Natural Resources Committee voted 16-7 in favor of confirming Perry, clearing the way for an expected confirmation by the full chamber.

Acting FERC Chairman. On January 26, 2017, President Trump named Commissioner Cheryl LaFleur as the Acting Chairman of FERC, replacing then-current Chairman Norman Bay, who, with LaFleur's appointment, was demoted to Commissioner. LaFleur has been a member of the Commission since her appointment in 2010 and served as Acting Chairman from November 2013 to July 2014, as well as Chairman from July 2014 to April 2015. The appointment of LaFleur, a Democrat, as Acting Chairman is only temporary, as President Trump is expected to nominate a Republican Chairman, as well as two other Republicans to fill the Commission's two vacant Commissioner seats. It is not immediately known when, or who, President Trump will nominate to fill the vacant Commissioner positions; however, there is some speculation that Neil Chatterjee, senior adviser to Senate Majority Leader Mitch McConnell, is among those to be named.

The appointment of LaFleur as Acting Chairman was not without controversy. Mere hours after LaFleur was named Acting Chairman, Commissioner Bay announced his resignation from the Commission, effective February 3, 2017, more than one year before his term was set to expire. With Bay's departure from FERC, the Commission is left with only two sitting members of the Commission, which is one member short of the quorum needed to conduct many facets of Commission business.

Nuclear Regulatory Commission Chairman. On January 26, 2017, President Trump appointed Commissioner Kristine Svinicki, a Republican, as Chairman of the NRC. Svinicki, a nuclear engineer, served for more than 10 years as an aide to Senator John McCain (R-AZ) and former Senator John Warner (R-VA) on the Senate Armed Services Committee before she was appointed as a Commissioner on the NRC by President George W. Bush in 2008. President Barack Obama reappointed Svinicki to a second five-year term in 2012. Svinicki replaces Stephen Burns, an Independent, who was nominated to the NRC by President Obama in 2014, and will remain on the NRC alongside Commissioner Jeffery Baran, a Democrat, appointed in 2013. Two other seats are currently vacant on the NRC, which can be composed of no more than three Commissioners from any single political party.

Svinicki's reappointment to the NRC by President Obama in 2012 produced some controversy within the Democratic Party, as Svinicki assisted in the planning of a nuclear waste repository in Nevada's Yucca Mountain. Former Majority Leader Senator Harry Reid (D-NV) has opposed construction of the Yucca Mountain facility, and Congress has not appropriated any new funding to the construction of the Yucca Mountain facility since 2010. However, at his confirmation hearing on January 19, 2017, Perry would not foreclose the possibility of storing nuclear waste in the Yucca Mountain facility in the future.

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STATES LOOK TO MARKET SOLUTIONS TO SUPPORT NUCLEAR POWER

On August 1, 2016, the New York Public Service Commission ("PSC") adopted a sweeping energy bill, the Clean Energy Standard Order, with the goals of combating climate change and ensuring a diverse and reliable low-carbon energy supply. One provision implements a nuclear-specific zero-emissions credits ("ZEC") program that is intended to prevent the premature retirement of three of New York's nuclear power plants. Nuclear power plants generate zero carbon emissions. Therefore, the premature retirement of nuclear power plants means the loss of a sizable amount of zero-carbon electricity generating capacity—capacity that would likely be replaced by carbon-emitting gas or coal. For a variety of reasons, recent wholesale electricity auction prices have been inadequate for nuclear generators to cover their marginal operating costs. As such, nuclear plants throughout the country are at risk of imminent retirement. New York is one of the first states to enact legislation intended to preserve the zero-emission attributes of nuclear generation by creating a market-based credit system.

ZEC programs are designed to operate similar to renewable energy credit ("REC") programs, which are a common way for states to promote electricity generation from renewable resources. Like RECs, ZECs represent the environmental attributes of zero-emission nuclear power and are sold separately, or "unbundled," from the electricity itself. Under the New York law, one ZEC represents the environmental attributes of one megawatt hour ("MWh") of electricity produced by a qualifying nuclear facility. In other words, for each MWh of electricity a nuclear plant generates, up to a codified cap, it will earn one ZEC.

In New York, qualifying nuclear facilities are eligible to sell ZECs to the New York State Energy Research and Development Authority ("NYSERDA"). All load servicing entities ("LSEs")—entities that serve end-use electricity customers—within the state are then obligated to purchase their proportional share of ZECs from NYSERDA. The LSE recovers the ZEC costs from ratepayers though commodity charges on customer bills. ZEC pricing is set by the PSC using a formula based on the social cost of carbon. The state intends to utilize the ZEC program to help achieve its goals of reducing carbon emissions while preventing the premature loss of nuclear power's desirable zero-emission attributes.

New York's ZEC program is being challenged in federal court. *See Coal. for Competitive Elec. v. Zibelman*, No. 1:16-CV-8164 (SDNY filed Oct. 19, 2016) ("*Zibelman*"). The plaintiffs, who include various electricity generators, claim the ZEC program is preempted by federal law because it intrudes on the Federal Energy Regulatory Commission's exclusive authority over the sale of wholesale electricity. The plaintiffs rely heavily on *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct 1288 (2016). In *Hughes*, the U.S. Supreme Court struck down a Maryland law designed to incentivize construction of new in-state electric generation facilities. The Maryland law required LSEs to enter into a 20-year pricing contract, called a "contract for difference," with a company selected to build a new gas-fired power plant in the state. The contract for differences required the plant owner to sell its capacity into the wholesale market, but if the market clearing price was below the contract price, LSEs were required to pay the difference. In striking down the law, the Supreme Court held that the contract for differences provided a guaranteed rate of return distinct from the wholesale clearing price and thus "invade[d] FERC's regulatory turf." *Id.* at 1297.

The plaintiffs in *Zibelman*, citing *Hughes*, argue that "[t]he ZEC Order invades [FERC's regulatory turf] because it directly affects the wholesale clearing price of electricity sales in the [wholesale electricity] auctions." Complaint at 35, *Coal. for Competitive Elec.*, No. 1:16-CV-8164. The defendants argue that the ZEC program does not suffer from the "fatal defect" that rendered Maryland's program unacceptable because it does not involve payment for sales of electricity into a wholesale auction at prices different than the FERC-approved auction prices. Motion to Dismiss at 19, *Coal. for Competitive Elec.*, No. 1:16-CV-8164.

In *Hughes*, the Supreme Court distinguished between programs like Maryland's, which operate within the wholesale market, and those that operate outside the auction. The Court emphasized that "[n]othing in [*Hughes*] should be read to foreclose . . . States from encouraging production of new or clean generation through measures 'untethered [from] a generator's wholesale market participation.'" *Hughes* at 1299. The defendants argue that, like RECs, ZECs are untethered from wholesale market participation and simply provide compensation for the desirable environmental attributes of electricity produced by zero-emission nuclear facilities. Motion to Dismiss at 22, *Coal. for Competitive Elec.*, No. 1:16-CV-8164. The outcome of *Zibelman* will have an effect beyond New York, as Illinois—which recently passed similar ZEC legislation—and other states look to emulate the ZEC program in an effort to save their nuclear plants from imminent retirement.

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CLIMATE CHANGE LITIGATION

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OREGON FEDERAL JUDGE ADOPTS RECOMMENDATION TO DENY MOTIONS TO DISMISS CHILDREN'S LAWSUIT ON CLIMATE CHANGE

As described more fully in the Spring 2016 issue of *The Climate Report*, in April 2016, a federal magistrate judge in Oregon denied motions to dismiss a lawsuit filed against the federal government by a group of plaintiffs ranging between ages 8 and 19 seeking relief from government action and inaction that allegedly results in carbon pollution of the atmosphere, climate destabilization, and ocean acidification. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or.). On November 10, 2016, U.S. District Judge Ann Aiken adopted the magistrate judge's recommendation to deny the motions to dismiss the lawsuit.

The plaintiffs argue that the federal government has known for more than 50 years that carbon dioxide ("CO_2") produced by burning fossil fuels was destabilizing the climate system and that despite this knowledge, the defendants "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels." The plaintiffs allege violations of their constitutional rights (including their substantive due process rights to life, liberty, and property) and the public trust doctrine. The plaintiffs seek a declaration that their constitutional and public trust rights have been violated and an order enjoining defendants from violating those rights and directing defendants to prepare and implement a plan to reduce CO_2 emissions. The defendants moved to dismiss the action, arguing that the plaintiffs improperly ask the court to rule on political issues, lack standing, and do not raise any constitutional claims. The court addressed each of the issues in turn.

Political Question. Judge Aiken determined that the plaintiffs' case does not present a political question. She reviewed six criteria that could each signal the presence of a political question, concluding that none suggested the "need to step outside the core role of the judiciary to decide this case." She added, "[a]t its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." Finally, she noted that although "separation of powers" might become problematic should the plaintiffs prevail, speculation about crafting a proper remedy could not support dismissal "at this early stage."

Standing. Next, Judge Aiken found that the plaintiffs have standing. First, she found that the plaintiffs adequately allege injury in fact, as various plaintiffs allege specific examples of their injuries (e.g., increased wildfires and extreme flooding jeopardizing personal safety). She held that the alleged injuries are concrete and particularized, as opposed to generalized grievances. She also found the alleged injuries to be imminent—harm that is "ongoing and likely to continue in the future." Second, Judge Aiken found that the causation element of standing was satisfied primarily for two reasons: (i) she was bound to accept the plaintiffs' allegations of a causal relationship between their injuries and the defendants' conduct as true at the motion to dismiss stage; and (ii) the emissions at issue in this case make up a significant share of global emissions, and the plaintiffs' chain of causation allegations are not vague. Finally, Judge Aiken held that the plaintiffs' requested relief would redress their injuries if they can show, as alleged, "that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO_2 and slow climate change[.]"

Constitutional Claims. Having found that the plaintiffs' suit survived threshold political-question and standing issues, Judge Aiken moved onto plaintiffs' due process and public trust claims.

Due Process. The defendants challenged the due process claim on two grounds: (i) they asserted that any challenge to their affirmative actions could not proceed because the plaintiffs "failed to identify infringement of a fundamental right or discrimination against a suspect class of persons"; and (ii) the plaintiffs could not challenge the defendants' inaction because they "have no affirmative duty to protect plaintiffs from climate change." As to the first challenge, Judge Aiken exercised her "reasonable judgment" and held that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." By doing so, she stated that she "intend[s] to strike a balance and to provide some protection against the constitutionalization of all environmental claims." On one hand, she said, "the phrase 'capable of sustaining human life' should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species." On the other, she said, "acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation." She clarified her statements by holding that "where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation."

As to the defendants' second challenge, Judge Aiken noted that the Due Process Clause normally does not impose on the government an affirmative obligation to act, but that there is a "danger creation" exception to this general rule, which "permits a substantive due process claim when government conduct 'places a person in peril in deliberate indifference to their safety.'" She held that the plaintiffs satisfied the criteria for this claim by showing that: (i) the defendants' acts created the danger to the plaintiffs; (ii) the defendants knew their acts caused that danger; and (iii) the defendants, with deliberate indifference, failed to act to prevent the alleged harm. Judge Aiken noted that these stringent standards "are sufficient safeguards against the flood of litigation concerns raised by defendants" and posed "a significant challenge" for the plaintiffs; however, she reiterated that at the motion to dismiss stage, she was bound to accept the factual allegations in the complaint as true.

Public Trust. Judge Aiken summarized the public trust doctrine as "the fundamental understanding that no government can legitimately abdicate its core sovereign powers." According to Judge Aiken, "Plaintiffs' public trust claims arise from the particular application of the public trust doctrine to essential natural resources. With respect to these core resources, the sovereign's public trust obligations prevent it from 'depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.'" Judge Aiken said that the government, as natural resources trustee, "has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust." Judge Aiken did not take a position on whether the atmosphere is a public trust asset, finding such a determination unnecessary because the plaintiffs have alleged violations in connection with the territorial sea, which already has been determined by the U.S. Supreme Court to be a public trust asset.

Continuing, she said that the public trust doctrine is generally thought to impose three types of restrictions on governmental authority: "[F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses."

In spite of the limitations and challenges to the plaintiffs' case noted by Judge Aiken, if this decision stands, it is likely to embolden other plaintiffs to bring environmental claims based on the same or similar theories in the future. Therefore, the decision almost certainly will be appealed (the timing of which, however, could be years down the road), particularly because the Trump Administration, which has vowed to rescind major climate change regulations enacted by the Obama Administration, is likely to continue vigorously defending against these claims.

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NINTH CIRCUIT AFFIRMS ENDANGERED SPECIES ACT LISTING DECISIONS BASED ON THE EFFECTS OF CLIMATE CHANGE

As first covered in the Spring 2013 issue of *The Climate Report*, on March 1, 2013, the United States Court of Appeals for the District of Columbia Circuit affirmed U.S. Fish and Wildlife Service's ("FWS") listing of the polar bear as "threatened" under the Endangered Species Act ("ESA"). The court did so based in part on FWS's reliance on numerous published studies and reports describing the effects of climate change, including predictive climate models from the Intergovernmental Panel on Climate Change. *See In re Polar Bear ESA Listing & Section 4(d) Rule Litig.*, 709 F.3d 1 (D.C. Cir. 2013).

In 2016, the United States Court of Appeals for the Ninth Circuit took up the mantle and twice concluded that future climate change is an appropriate consideration under the ESA, reversing the District of Alaska's holding that the listing decisions were arbitrary and capricious. First, in *Alaska Oil and Gas Association v. Jewell*, 815 F.3d 544 (9th Cir. 2016), the Ninth Circuit upheld FWS's decision to designate an area of Alaska's coast and waters as critical habitat for the polar bear, noting that FWS properly considered future climatic factors in designating critical polar bear habitat. The state of Alaska, industry organizations, and Alaska Native groups have recently filed petitions for a writ of *certiorari* seeking reversal of the Ninth Circuit's decision. *See* Nos. 16-596, 16-610.

Second, the Ninth Circuit upheld the National Marine Fisheries Service's ("NMFS") decision to add a subspecies of the Pacific bearded seal to the endangered species list. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016). The court found that NMFS's projections of future habitat loss due to climate change were reasonable, scientifically sound, supported by evidence, and based on the best available scientific data.

In 2017, the Ninth Circuit will have a third opportunity to address a listing decision under the ESA, this time NMFS's decision to list the Arctic ringed seal as a threatened species. *Alaska Oil & Gas Ass'n v. Pritzker*, Nos. 16-35380, 16-35382. As in the two 2016 cases, the District of Alaska found the listing decision arbitrary and capricious. NMFS appealed. Briefing on the appeal is expected to be completed sometime in the first quarter of 2017.

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CLIMATE CHANGE REGULATION BEYOND THE U.S.

Chris Papanicolaou, Editor

RECENT DEVELOPMENT IN THE LEGAL QUALIFICATION OF EMISSION ALLOWANCES UNDER FRENCH LAW

Created in 2003 by Directive 2003/87/EC, the European carbon market is the European Union's ("EU") flagship policy to promote reduction of greenhouse gas ("GHG") emissions. Emission allowances, which once merely granted permission to industrial facilities to emit GHG, have now transformed into financial instruments.

While trading in derivatives of emission allowances fell under the scope of the Markets in Financial Instruments Directive (MiFID 2004/39/EC), uncertainty remained until recently as to the status of the emission allowances themselves. In the wake of a series of fraudulent practices that occurred in spot secondary markets in emission allowances as well as value-added tax, or VAT, fraud, the European Commission decided to take steps to dispel this uncertainty and brought emission allowances fully under the MiFID scope by classifying them as financial instruments in the "MiFID II" Directive 2014/65/EU of May 15, 2014. Additionally, the classification of emission allowances as financial instruments in MiFID II allowed for the sanction mechanisms of the 2014 Market Abuse Directive and Regulation ("MAD/MAR") to apply to emission allowances.

In France, the legislature never specifically classified emission allowances as financial instruments. Pursuant to the French Environmental Code, an "emission allowance" is defined as "a unit of account representing the emission equivalent of one ton of carbon dioxide" (art. L.229-7), and emission allowances constitute "movable property" (art. L.229-15). However, they do not fit under the French Monetary and Financial Code definition of "financial instruments," even though this code places the French Financial Markets Authority ("*Autorité des Marchés Financiers*" or AMF) in charge of the supervision of emission trading alongside its supervision of usual financial instrument trading.

On June 21, 2016, the French Law reforming the market abuses repression system (*Loi n° 2016-819 réformant le système de* *repression des abus de marché*) was adopted into French law, in replacement of MAD/MAR.

On June 23, 2016, the French government issued an ordinance regarding financial instruments markets (*Ordonnance n° 2016-827 relative aux marchés d'instruments financiers*), which transposed MiFID II/MiFIR. This new definition will enter into force on January 3, 2018. These two acts modify the French Monetary and Financial Code to integrate emission allowances within the scope of investment services, as well as in the provisions governing investment service providers, and strengthen the AMF's oversight over the allowances.

Even more recently, on December 9, 2016, the Sapin II law (*Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*) further strengthened the control and investigation powers of the AMF over emission allowances.

These reforms continue the French tradition of classifying emission allowances in a hybrid category parallel to financial instruments. The legislator thus picks and chooses which provisions of the Monetary and Financial Code apply to emission allowances, as if they were financial instruments, and which do not. This approach is consistent with the European texts insofar as MiFID II classifies emission allowances as financial instruments only for the purposes of applying the EU financial markets regulation, not for the purpose of dealing with the legal nature of emission allowances.

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EUROPEAN COMMISSION PUBLISHES LANDMARK LEGISLATIVE PACKAGE ON CLEAN ENERGY

On November 30, 2016, the European Commission ("Commission") published its long-awaited legislative package to accelerate the EU's clean energy transition. The proposals have three main goals: putting energy efficiency first, achieving global leadership in renewable energies, and providing a fair deal for consumers.

The Commission hopes to achieve these goals by improving energy efficiency in buildings, enhancing the energy performance of products (ecodesign), and providing better information to consumers (energy labeling). The proposed building measures aim to speed up the renovation rate of existing buildings with a view to decarbonizing the EU's building stock by the mid-century. The ecodesign and energy labeling measures are designed to ensure that only energy-efficient appliances are sold in the EU. The Commission is also launching a "smart finance for smart building" initiative to unlock private financing for energy efficiency and renewables in buildings at a greater scale. As an encompassing element, the Commission has also proposed a binding EU-wide target of 30 percent for energy efficiency by 2030.

The Commission is clear that the core reason why it has taken action now is economic growth, noting that in 2016, clean energy attracted a record global investment of more than €300 billion, six times the amount in 2004. The Commission hopes that the proposed measures will unlock energy savings that can boost growth in the EU's economy, investment, and job creation. The binding EU-wide energy efficiency target is intended to reduce the EU's fossil fuel imports and create more jobs and greater domestic output.

The proposals are primarily packaged in a vast series of communications and draft revised laws, including a draft revised Energy Efficiency Directive and Energy Performance of Buildings Directive. However, there are a handful of brand-new proposed regulations, including an Energy Union Governance Regulation, which brings together a range of planning and reporting obligations that are currently spread across different pieces of legislation.

The proposals are, however, far from final. Over the next 18 to 24 months the EU Council and EU Parliament will review and vote on the measures. As they make their way through the EU's political process, we are likely to see amendments based on member-states' own priorities. Additionally, even when the revised directives have passed through the EU's political process, they will need to be implemented by national laws passed in each member-state.

The final nature of the proposals will also depend on industry and other stakeholder perspectives. The present proposals have received a mixed response. The European Association of Craft, Small and Medium-sized Enterprises is largely supportive of the proposals, noting in particular that it welcomes energy audits for SMEs remaining voluntary. Commentators have also reacted positively to the regulatory clarity promised by the Energy Union Governance Regulation.

However, environmental groups have denounced the proposals as not going far enough. The World Wildlife Fund ("WWF") has stated that the proposals undermine renewables by leaving the door open to subsidies for existing coal plants until 2026 at the latest. Additionally, it is observed that the 30 percent energy efficiency target is binding only at the EU level. Without national binding targets, it unclear how the Commission will ensure the target is met. The WWF has said it is "now up to the European Parliament and to the Council to add some backbone." Given the numerous other issues on the EU Parliament and Council's plate, it will be interesting to see if they take up this challenge. A long road lies ahead, and the final destination is unclear.

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Nikesh Pandit of the London Office assisted in the preparation of this article.

CHINA: THE NEW GLOBAL LEADER IN CARBON PRICING?

In 2017, China is expected to launch the world's largest mandatory national cap-and-trade program, also known as an emissions trading scheme ("ETS"). With an estimated quota of between three and five billion metric tons of GHG emissions, China's national ETS will be twice the size of the EU's ETS and larger than all existing carbon markets combined.

How Will China's ETS Work? China's national ETS will apply to all companies or enterprises in China that consumed at least 10,000 metric tons of coal equivalent between 2013 and 2015 in eight major industries: (i) petrochemicals; (ii) chemicals; (iii) building production and materials; (iv) iron and steel; (v) nonferrous metals; (vi) pulp and paper; (vii) power; and (viii) aviation.

China's national ETS will be capped nationally and regionally. Regional caps will be determined by the number of relevant polluting entities in each province. Relevant entities will have to prepare annual emissions reports according to central government guidelines in order to be submitted to regional governments, which will have the power to impose fines and revoke licences. Several foreign entities are already members of pilot schemes launched in 2013 in seven of China's key cities and provinces.

Lessons from the EU. China faces many of the same problems faced by the EU's ETS. Concerns of an oversupply of allowances, due in part to allocation problems and a drop in fossil-fuelled power generation and manufacturing, reflect an issue that has plagued the EU's ETS since its inception. Faced with critical oversupply, the European Parliament voted to remove one billion excess allowances from the EU's ETS in December 2015. With China's pilot schemes already suffering reduced demand due to overallocation, it remains to be seen whether China's national ETS can avoid the same fate.

In addition, both China and the EU have struggled with the question of how carbon is to be adequately priced. A recent report suggested that a price of ¥240 (€32.93) per metric ton of GHG would be required to drive broad emission cuts from China's relevant entities. But so far, the price has been predicted to range between ¥30–¥40 (€4.12–€5.49). In relation to the EU's ETS, the price per metric ton of GHG allowances fell from €29.20 in July 2008 to €4.70 by January 16, 2017.

If China succeeds in implementing its national ETS, the country will be one step closer to satisfying its Nationally Determined Contribution Plan under the Paris Agreement, which includes peaking GHG emissions levels by 2030. The Paris Agreement itself envisaged a harmonized global emissions mitigation mechanism, potentially allowing for a future system to link up ETSs from around the world.

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